

Yang (Migration) [2023] AATA 1939 (18 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Tianxia Yang Miss Shuyang Zhou
REPRESENTATIVE:	Ms Zhaoxia Melynn Li (MARN: 1068520)
CASE NUMBER:	2002040
HOME AFFAIRS REFERENCE(S):	BCC2016/2489571
MEMBER:	Donna Petrovich
DATE:	18 May 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations • It follows that the secondary applicant meets the requirements for cl 820.321 of Schedule 2 as a dependent or member of the family unit of a person who has satisfied the primary criteria.

Statement made on 18 May 2023 at 3:25pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – the parties were validly married – there is a genuine pooling of financial resources by the couple – the couple have an active social life and are viewed by others as being in a spousal relationship – parties were and continue to live together in a genuine and continuing relationship – a member of the family unit of a person who has satisfied the primary criteria – decision under review remitted

LEGISLATION

Migration Act 1958, ss, 5, 65, 359

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221, 820.321

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The first named applicant (the applicant/primary review applicant) applied for the visa on 26 July 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The secondar applicant was included in the applications as a dependent or member of the family unit of the first named applicant.
4. The delegate refused to grant the visa on the basis that the visa applicant (the first named applicant) did not satisfy cl 820.211 (2) of the Regulations. After considering the evidence the delegate remained unsatisfied that the applicant and sponsor were spouse or de facto partners as defined under section 5F and 5CB of the Act.
5. The delegate also found that the secondary applicant did not meet cl. 820.211 and cl 820.321 of the Regulations.
6. The applicants appeared before the Tribunal on 19 April 2023 to give evidence and present arguments. The Tribunal received oral evidence from Ms Shuyang Zhou (the secondary applicant) and Mr Tianyun Li (the Australian citizen sponsor).
7. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

8. Background

9. The first named applicant is a forty-four (44) year old Chinese national. Previously, she worked in finance whilst in China. She met the sponsor when visiting her home village where they had both grown up, as neighbours in a small village. The sponsor was there on holiday visiting family in 2014. They recognised each other, went out shopping and started talking.
10. The first named applicant is a divorcee. The secondary applicant is her seventeen (17) year old daughter and is a student.
11. The sponsor is a sixty-seven (67) year old Australian citizen, who was born in China. He has been married previously and has one (1) son. He is self employed and works as a handyman.
12. The couple exchanged telephone numbers. After they met again in December 2014, they talked on We Chat and Video calls.
13. In March 2015 the couple entered their relationship, continuing to communicate via We Chat.

14. On 9 April 2015 the sponsor proposed to the first named applicant, and afterwards the sponsor returned home to Australia.
15. On 15 August 2015 the first named applicant first visited Australia to seriously consider whether she would move to Australia to be with her prospective husband and accept his marriage proposal. During this trip she entered Australia as the holder of a Visitor (subclass 600) visa, departing on 19 September 2015.
16. On 18 May 2016 the first named applicant returned to Australia as the holder of a Visitor (subclass 600). She lodged a Partner (subclass 820/801) visa on 27 July 2016 and is currently the holder of a Bridging Visa (subclass A).
17. Since arriving in Australia, the first named applicant and sponsor have purchased their own home, with the assistance of her mother and a family friend.
18. The sponsor was diagnosed with prostate cancer. He has now recovered, having undergone chemotherapy and surgery.
19. Both applicants were represented in relation to the review.
20. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue is whether the Tribunal is satisfied that there is sufficient evidence to demonstrate that the couple are in a genuine and continuing relationship, with a shared commitment to a shared life as a married couple.

Whether the parties are in a spouse or de facto relationship

22. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the first named applicant claims to be the spouse of the sponsor (who is an Australian citizen).
23. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

24. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The first named applicant has provided a copy of the Marriage Certificate dated 12 September 2015. Further, copies of photographs of the day her husband proposed to her, their wedding ceremony and events after their wedding (with

family and friends) have also been submitted to the Tribunal. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

25. Financial aspects of the relationship

26. The first named applicant told the Tribunal that when she lived in China, she held a senior position with a Company as a financial controller.
27. Due to her lack of English, in Australia the first named applicant found work as a factory worker. She has changed employment a number of times and has now found a position in Braeside.
28. The couple have bought a house together in Frankston, moving to live closer to their work. The Tribunal heard from the first named applicant that they borrowed \$210,000 and \$50,000 from her mother in China and a friend known as "sister Julia" respectively. The house mortgage is in joint names of the first named applicant and the sponsor. Documents to substantiate the home loan amount, the joint mortgage and repayments were provided to the Tribunal.
29. The Tribunal heard that the first named applicant had maintained her own bank accounts and owned her own property in China. The Chinese rules of property ownership do not allow for her husband to be included as a joint property owner as he is no longer a Chinese citizen. Also, due to international property law, the property documentation was not able to be finalised.
30. The Tribunal heard that the couple have two (2) joint bank accounts into which their wages are deposited. In May 2020 they purchased their own home in Frankston. This property is in joint names. They both contribute to the mortgage repayments.
31. Both joint accounts are managed by the first named applicant. This is because she is recognised as being the better financial manager in their relationship.
32. The Tribunal heard that they both pay bills depending on who has the most time on receipt of the bills. They both have their own vehicles registered in their own names. The sponsor purchased the first named applicant an Audi Q7 for her birthday.
33. The Tribunal accepts the evidence and is satisfied that there is a genuine pooling of financial resources by the couple. The Tribunal places weight in favour of the application.

34. Nature of the household

35. The Tribunal heard that the first named applicant and sponsor both provide care for the secondary applicant, who is now seventeen (17) years of age. Although she is the daughter of the first named applicant, both take her to school and pick her up after school. They often stop for "junk food" as a treat.
36. The couple often travel around Victoria in their spare time. They enjoy travelling to tourist destinations such as the 12 Apostles, Phillip Island and the Mornington Peninsula.
37. The secondary applicant told the Tribunal that she is close with both the sponsor and her mother. They spend their spare time in "chit chat", going out for coffee and to breakfast.

38. The first named applicant told the Tribunal that she did the grocery shopping whilst the sponsor on most days prepared breakfast, coffee and lunch for her and her daughter (the secondary applicant). The first named applicant does the grocery shopping. The sponsor does the cleaning, washing and most of the housework.
39. The Tribunal accepts that the couple share household responsibilities and care of the first named applicant's daughter. The Tribunal is satisfied that there is a genuine paternal relationship between the sponsor and the first named applicant's daughter. They are genuinely fond of each other, spending time together as father and daughter. The Tribunal places some weight in favour of the application.

40. Social aspects of the relationship

41. The Tribunal heard that the first named applicant's mother initially did not view the relationship favourably due to the couple's significant age difference of twenty-three (23) years. But she has been swayed by the sponsor who spoke about the importance of many life issues and values.
42. The couple have a group of friends who they meet with socially, often going away on day trips to the Mornington Peninsula and Abalone fishing.
43. The first named applicant talked about her friendship with "sister Julia" who was introduced to her by the sponsor and who hosted the couple's wedding at her home.
44. The Tribunal accepts that the couple have an active social life and are viewed by others as being in a spousal relationship. Therefore, the Tribunal places some weight in favour of the application.

45. Nature of persons commitment to each other

46. The couple had maintained a relationship prior to their marriage on 12 September 2015. They first met in November 2014 and established their relationship from 9 April 2015 (communicating up to three (3) times per day on We Chat and video links).
47. They have purchased a home together. Since they married the couple have maintained a continuous relationship for a period of nearly eight (8) years. The Tribunal views this time period as significant.
48. The first named applicant supported the sponsor when he was suffering from prostate cancer. She looked after him, ensuring he was able to rest, assumed responsibility for the finances, ensuring he was given the most nutritious food, maintained his chemotherapy and was at the sponsor's bedside every day after his surgery.
49. The secondary applicant provided testimony to the Tribunal that she called the sponsor 'dad', their relationship was very close, and their family life was very important to all of them.
50. The Tribunal accepts that the couple are in a genuine spousal relationship. This finding is supported by the fact that the first named applicant cared for the sponsor during his period of ill health, the couple have jointly purchased a home, and care for the first named applicant's daughter together. The Tribunal places significant weight in favour of the application in this regard.

51. Any other circumstances of the relationship

52. The Tribunal wrote to the first named applicant pursuant to s. 359A of the Act, seeking her response to adverse allegations relating to the genuineness of the couple's relationship. The gist of the allegations presented to the first named applicant by the Tribunal noted that the couple's relationship was not genuine, that it was contrived, that they were cousins and that the sponsor was to be paid for sponsoring the first named applicant.
53. The first named applicant responded to the section 359A letter, addressing the issues raised in relation to the couple's relationship. In particular, the first named applicant provided an explanation in relation to the allegation that the couple were cousins. She told the Tribunal that in China it is customary for older women to be called 'aunty'. And that perhaps someone had overheard her husband addressing the first named applicant's mother as 'aunty'. The first named applicant stated that she would have provided other documentation if possible. But as her husband's mother had passed away these records would be impossible to locate.
54. An allegation had also been raised that the first named applicant had worked illegally. However, the Tribunal accepts that this is a baseless allegation as the first named applicant's visa permits her to work legally in Australia.
55. The Tribunal accepts the first named applicant's submissions in relation to the section 359A letter. No weight is placed on the adverse allegations by the Tribunal.
56. The Tribunal has also considered the financial aspects of the relationship, including their joint ownership of assets; their joint liabilities; the extent of the pooling of their financial resources; legal obligations owed to the other party; and the sharing of day-to-day household expenses.
57. The Tribunal is satisfied that the couple have a mutual commitment to a shared life to the exclusion of others; that it is a genuine and continuing relationship; and that they live together (that they do not live separately and apart on a permanent basis).
58. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and the time of this decision.
59. Therefore, the first named applicant meets cl 820.211(2)(a) and cl 820.221 (1)(a).
60. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

61. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl. 820.211 (2)(a) of Schedule 2 to the Regulations
 - cl. cl 820.221 of Schedule 2 to the Regulations
62. It follows that the secondary applicant meets requirements of cl. 820.321 of Schedule 2 to the Regulations as a dependent or a member of the family unit of a person who has satisfied the primary criteria.
- 63.

64.

Donna Petrovich
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).